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In The

Supreme Court of the United States

October Term, 1958

No. 953

ANNA BEDNO, JACOB BEDNO, SAMUEL J. RITHOLZ, SYLVIA RITHOLZ, MORRIS I. RITHOLZ, FANNY RITHOLZ, BENJAMIN D. RITHOLZ, SOPHIE RITHOLZ, Co-partners Doing Business Under the Assumed Name, Designation and Style of KING OPTICAL COMPANY,

Petitioners,

vs.

DAN B. FAST, AUGUSTUS N. ABBOTT, FRED N. HARRIS, EDWARD D. LA COURSE, NEWTON E. W. LENZ, as the Wisconsin Board of Examiners in Optometry, and WILLIAM J. McCAULEY, District Attorney for Milwaukee County, Wisconsin,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATION TO OPINION BELOW

(March 3, 1959) 6 Wis. 2d 471, 95 N. W. 2d 396.

JURISDICTION

The judgment of the Wisconsin Supreme Court affirmed that of the Circuit Court for Milwaukee County on summary judgment motions by both parties in an action for declaratory judgment and injunction. It was adjudged that in the regulation of the furnishing of eyeglasses in the interests of public health the state may prohibit all price advertising and that the federal statute which prohibits false advertisement of devices such as eyeglasses does not cover the same subject matter as the state statute and does not by pre-emption preclude the state from so exercising its police powers.

QUESTION INVOLVED

Is a state precluded from abolishing all price advertising of eyeglasses because a federal statute prohibits false advertising of such devices?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to Art. I, Section 8, Art. VI, Section 2 United States Constitution, 15 U.S.C. § 45 (a), § 52 (a-b) and § 55 (a) (1) and (d) referred to at p. 3 of the Petition reference is made to Section 153.10, Wisconsin Statutes (1957), printed in Appendix B to the Petition, p. 26, as a part of the Wisconsin Supreme Court's opinion, and in footnote 3, p. 7 of the Petition.

STATEMENT

The only amplification of the Statement of the Petitioners which Respondents would like to make is that there was no allegation in the pleadings that any of the price or other advertising of petitioners in the Milwaukee newspapers or elsewhere was false, misleading, fraudulent, deceiving, or for the purpose of causing misunderstanding. It was admitted in the Answer that such statements were full, fair, complete and truthful, and all articles advertised were actually of the type, kind, quality and description set forth in the advertisements. Appendix B of Petition, p. 26. Thus no issue of fact on this point was raised by the respective motions for summary judgment.

REASONS FOR DENYING THE WRIT

1. *A state is free in the interests of public health to prohibit ALL price advertising of eyeglasses, and a federal statute designed to prevent only unfair and deceptive acts or practices in commerce does not constitute a pre-emption of the entire field of eyeglass advertising*

The Wisconsin Statute, Sec. 153.10 (1957 Stats.) prohibits *all* price advertising of eyeglasses. The fact that such advertising may be honest and fair is no defense as it would be under the federal statutes cited in the Petition.

In *Williamson v. Lee Optical Co. of Okla., Inc.*, (1955) 348 U. S. 483, the Oklahoma statute made it unlawful to solicit the sale of eyeglasses by any means of advertisement, and it was said at p. 490:

> "* * * Or it [the legislature] might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. * * *"

Also at p. 490:

> "* * * We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers. * * *"

While the optical company in the *Oklahoma* case did not rely on the Federal Trade Commission statutes cited here, the petitioners in the instant case have pointed to no cases or proceedings where federal statutes have been invoked other than those in which fraud and deception were claimed.

2. *The federal statutes are aimed at fraudulent advertising only and cannot be invoked to prohibit truthful price advertising*

"It is the dissemination of false advertising that the statute is directed against." *Shafe v. Federal Trade Commission* (1958 U. S. Court of Appeals, 6th Circuit) 256 Fed. 2d 661, 663.

It is contended at pp. 9 and 10 of the Petition that an advertisement containing completely truthful statements can be a false advertisement within the meaning of the federal statute, and that this may be because things are omitted that should be said, or because advertisements are composed or purposely printed in such a way as to mislead.

No one would deny that under such circumstances there would be "unfair or deceptive practices in commerce" within the meaning of the federal statute, but it is the unfairness or deceptiveness that is the subject of the attack rather than price advertising which the Wisconsin Statute wholly abolishes. In other words, the rationale of the Wisconsin Statute is that the public interest in visual care requires that eyeglasses should be furnished to meet the needs of the patient rather than to meet an advertised price, though a truthful one.

There are no allegations here that petitioners' advertisements are misleading although literally true, and Appendix E of the Petition, which consists of a copy of a Federal Trade Commission proceeding against petitioners shows that in such proceeding the petitioners were charged with disseminating false and misleading advertisements. Petitioners advertised that their $49.95 contact lenses were

identical with those advertised by others from $125 to $200 and that the price was reduced as a special introductory offer. Petition, p. 42.

The commission's decision held that the petitioners' lenses did not have a value of $125 to $200 nor any other value in excess of that which petitioners regularly and customarily charged. Petition, p. 45. This and other advertising statements by petitioners were found to be false, deceptive, and misleading within the intent and meaning of the Federal Trade Commission Act. Petition, p. 46.

It is accordingly impossible to equate such advertising with truthful price advertising which is prohibited under the Wisconsin Statute but which is not prohibited under the Federal Statute.

The two statutes operate in two entirely different orbits. The Federal Statute is concerned with unfair and deceptive acts in trade or commerce. The State Statute is based on the theory that the furnishing of prescription eyeglasses designed to fit a particular patient is a service pertaining to health and safety and that in prohibiting all price advertising of such eyeglasses the legislature was not dealing with traders in commodities. In other words, the purpose of the State Statute is exactly the same as that discussed in *Semler v. Oregon State Board of Dental Examiners* (1943) 294 U. S. 608, 612, where this court upheld a state statute prohibiting price advertising of dental prices even though such advertising might be free from deception in particular instances.

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with

traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. * * *"

The same reasoning applies here, since "Furnishing eyeglasses as much affects the public health as does furnishing dentures." *Ritholz v. Johnson* (1945) 246 Wis. 442, 453, 17 N. W. 2d 590.

3. Congress was not required to occupy the whole field and its inteniton to do so is not to be inferred from the fact that it has seen fit to occupy a limited field

In *Kelly v. Washington* (1937) 302 U. S. 1, 10, this court in considering the question of pre-emption said:

"There is no occupational rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

Likewise in *Savage v. Jones* (1911) 225 U. S. 501, 533:

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe

its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari herein should be denied.

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